Supreme Court, U.S.
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In The

Supreme Court of the United States

JANET M. BEAL

Petitioner,

vs.

CSX CORPORATION AND RANDSTAD

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Burlington Northern & Santa Fe Rail Co. v. White,* 548 U.S. 53 (2006), this Court protected the principle of "unfettered access to statutory remedial mechanisms." During a one year tenure, petitioner was victimized by respondents' "referral classification" system, which referred only Caucasian contractual employees to fill permanent administrative assistant positions at the corporate office site. Petitioner, the only African American contractual administrative assistant supporting executive level management, became the subject of mockery, discrimination, and harassment. Defenseless to reprisal after being suspected of complaints, petitioner was targeted by her prejudice managers in a systematic campaign of humiliation. After complaints to managers, the harassment escalated out of control resulting in termination, disqualification from all future work assignments, denial of unemployment benefits, termination from subsequent employer - Johnson & Johnson, and exile out of the city, in severe violation of the anti-discrimination statutes of Title VII § 703 (a) (1) (2) (b), and § 704 (a). The two critical points requiring this Court's supervisory power are: 1.) The district court held that petitioner "failed to establish a causal link between any protected activity, and an adverse employment decision." 2.) "Petitioner failed to establish a prima facie case of discrimination based on a failure to hire claim," affirmed by the Eleventh Circuit. To the contrary, under Burlington N. & S.F.R. Co. v. White, the Supreme Court expanded the rights of employees when it held that an employee can bring a Title VII retaliation claim based on retaliatory actions taken by an employer that do not directly impact the terms and conditions of an employee's employment, provided such actions are materially adverse to the employee. Furthermore, under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-05 (1973), petitioner's

race discrimination violation was established when respondents refused to hire, terminated and disqualified petitioner from all future work assignments after complaints of harassment, and the filing of U.S. EEOC charges. Caucasian contractual employees with no prior work history were referred by the third-party agency to fill "permanent" administrative positions, just three months after beginning their contractual tenure. Petitioner, however, had loyally supported respondents' executive management staff for a three year span, with an interval between tenure. Rather than fairly converting petitioner into a permanent employment position after numerous applications for permanent employment, respondents continued to discriminate, degrade, and humiliate petitioner by moving her to other departments once the temporary position she held was due to become permanent. The questions presented before this honorable Court are:

1. Whether Title VII's federal anti-discrimination statutes prohibit all retaliation that is reasonably likely to inhibit the exercise of protected rights, even if the retaliation does not consist of an adverse employment action.

2. Whether protection under the statutes extend to minority contractual employees, who are employed through temporary agencies, though denied the status of "employee," and most often the right to permanent employment, thus resulting in the lower courts erroneously failing to recognize the employee's discrimination and retaliation claims, and therefore refusing to settle this important issue.

LIST OF PARTIES

There are no additional parties to the proceedings other than those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Janet M. Beal, respectfully prays that this honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, and the United States District Court for the Middle District of Florida.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit appears at App. 1 - 6 to the Petition and was not reported.

The judgment of the United States District Court for the Middle District of Florida appears at App. 7 - 26 to the Petition and was not reported.

JURISDICTION

The court of appeals order was entered January 21, 2009. A timely petition for rehearing and rehearing en banc was denied on March 16, 2009. Petitioner filed a timely petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

42 U.S.C. § 2000e-2. [Sec. 703] (a) (1) (2), (b); and 42 U.S.C. § 2000e-3. [Sec. 704] (a) - Title VII of The Civil Rights Act of 1964 provides:

> [Sec.703] (a) "It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
>
> (b) "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED - Continued

Section 704(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor--management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

On December 15, 2006, Petitioner filed charges for damages, intentional emotional distress, compensatory, and punitive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging Respondents habitual violations of the statutes, including claims of slander and property pilfering violations. Respondents answered asserting numerous affirmative defenses. The parties conducted seven months of discovery through which Respondents were not forthcoming with much of the discovery documents requested by Petitioner.

On December 3, 2007, Respondents filed separate Motions for Summary Judgment, arguing that the companies have anti-discrimination policies in force, Petitioner was not qualified for the positions for which she applied, or some positions were abolished by the company. In contrast, Petitioner applied for two administrative positions in the public safety department where she was working as an administrative assistant. Respondents conveniently alleges to have no record of the public safety applications, however, produced twenty other employment applications submitted by Petitioner. (App. 17.) Although Petitioner was formerly introduced to the Caucasian contractual candidates who were hired to replace her in the public safety department, Respondents argued that Petitioner had no knowledge of the candidates who were hired for the positions in question. Callahan's sworn affidavit documented the other twenty candidates' demographics. (App. 18.) Petitioner interviewed, and was promised the administrative position in the corporate communications department, though again moved to the human resources department. (App. 11.) Respondents further argued that Petitioner never complained of harassment to management. Evidence of numerous

complaints was cited in the record by Petitioner, though disregarded. (App. 10.) Respondents insisted that the companies took no adverse action against Petitioner. On the contrary, Petitioner proved race discrimination through the refusal to hire by moving Petitioner around to other departments when the temporary positions she held were slated to become permanent, by termination and disqualification from future work assignments after complaints of harassment and the filing of EEOC charges, a denial of unemployment benefits, abrupt termination from subsequent employer Johnson & Johnson, followed by two years of unemployment due to Respondent's persistent interference with petitioner's prospective employers, and also through the hostile environment she endured. (App. 2). Respondents continued to argue that Petitioner was only a "contractual employee" hired through an "on-site" third-party "agency." (App. 9.)

Petitioner timely filed a response in opposition thereto, challenging the companies' "failed" anti-discrimination policies, its unlawful "referral classification" system, the "exclusion" of "contractual" workers as "employees," and the notion that Petitioner was not an employee of both Respondents because the third-party agency was located "on-site," when in fact, Petitioner provided documented proof that the agency was located "off-site." (App. 16.) The court denied, in particular, Petitioner's *"Failure to Hire"* and *"Retaliation"* claims, which arose when the contractual administrative positions held by Petitioner were offered to Caucasian contractual candidates who had no prior work history with Respondents, though offered permanent employment after three months of service. Petitioner, however, had been a loyal employee of Respondents for a three year span, supporting the executive management staff, though victimized by systematic "referral classification."

Petitioner's numerous employment applications were consistently rejected by Respondents, thus resulting in aggressive retaliation after termination.

On March 27, 2008, the court issued an Order granting Summary Judgment. The court found as follows: *"Failure to Hire"* - "Petitioner failed to establish a prima facie case of discrimination based on a failure to hire claim."; *"Hostile Environment"* - "The Court has considered all of the behavior and conduct collectively. Under the objective analysis, the Court finds that the conduct in question was not sufficiently severe or pervasive."; *"Retaliation"* - "The Court finds that Plaintiff has failed to establish a causal link between any protected activity and an adverse employment decision." *Slander* - "Under Florida law, one of the essential elements to prove a claim for slander is publication of a false statement . . ." *Intellectual Property Theft* – "This claim is not actionable under Title VII." (App. 7-26.) The trial court assessed costs against Petitioner, disregarding an abundance of direct and circumstantial evidence presented in support of each claim. (App. 5.)

On March 31, 2008 and April 9, 2008, Petitioner timely filed a Motion to Alter or Amend the Order and Judgment, Motion to Stay the Order and Judgment Pending Appeal, and a Notice of Appeal, citing mistakes regarding the failure to hire and retaliation claims, omitted evidence, and contrary or misapprehended findings. On April 21, 2008, Respondent Randstad filed in opposition to Petitioner's Motion to Alter or Amend the Order and Judgment.

On May 7, 2008, the District Court issued an Order denying Petitioner's Motion to Alter or Amend the Order and Judgment, and Motion to Stay the Order and Judgment Pending Appeal. On May 13, 2008, Petitioner

timely filed an Amended Notice of Appeal to include the District Court's final judgment. (App. 27-31.)

On January 21, 2009, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment, and entered its judgment. (App. 1-6.)

On February 4, 2009, Petitioner timely filed a Petition for Rehearing and Rehearing En banc, citing Supreme Court and other Circuit precedent, which were in conflict with the Eleventh Circuit, and the District Court's decision.

On March 17, 2009, the Eleventh Circuit Judges who affirmed the District Court's judgment, denied the Petition for Rehearing and Rehearing En banc. (App. 32-33.)

REASONS FOR GRANTING THE PETITION

I. Overview.

This case represents an issue of exceptional importance to the nation's enforcement of Title VII's anti-discrimination statutes. The case will settle whether the statutes extend to protect exploited minority contractual or temporary workers as employees of both the company and the third-party agency, settle the complex issue of "adverse employment action," as it relates to retaliation claims, and finally reconcile the lower courts failure to acknowledge discrimination or retaliation claims brought by contractual or temporary employees.

Contractual employees make up a vast majority of the workforce today. Generally, this workforce is the first assembly of employees to witness systematic discrimination, harassment, retaliation, and other forms of

unlawful employment practices. In violation of Title VII statutes, unfair company managers had employed the "referral" services of the third-party agency with intent to discriminate by adversely classifying Petitioner, a protected class individual, as "not eligible for permanent hire," or the classification "contractual worker," rather than "employee." In *Vizcaino v. Microsoft Corporation*, 97 F.3d 1187 (9th Cir. 1996), illegal classification of contractual and temporary employees resulted in severe penalties when the IRS reclassified 483,000 workers, allowing the contractual or temporary employees who had worked full-time, for at least one year or longer, on the same job site as regular employees, shared the same supervisors, performed the same functions, and worked the same core hours as the regular employees, to sue for permanent employment positions, back pay, benefits, and company stock. The court observed that both the third-party agency and the company were "equally employers" of the "temporary or contractual employees." "The litigation benefitted employers and workers nationwide by clarifying the law of temporary worker classification." (internal quotations and citations omitted)

The Vizcaino v. Microsoft findings were significantly important to temporary employees because many companies consistently excluded this workforce as legitimate employees, in part, insisting that the third-party agency is the only employer, thus eliminating the traditional employer-employee relationship, avoiding legal responsibility, abandoning the companies anti-discrimination policies, and thereby condoning exploitation of the minority contractual workforce. The Supreme Court let stand the federal court's ruling. The Court has held that "evidence that may be relevant to any showing of pretext includes facts as to. . . [an employer]'s general policy and practice with respect to minority employment."

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) "The Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 685 (10th Cir. 1998) (citation omitted)

II. Erroneousness of Decision Below in Applying Settled Supreme Court Precedent.

The lower court's opinion cannot plausibly be justified with any logical uniformity to the decision of this Court, nor other circuits regarding this same important matter. The district court held that Petitioner "failed to establish a causal link between any protected activity and an adverse employment decision . . ." (App. 23.) Further, Petitioner "failed to establish a prima facie case of discrimination based on a failure to hire claim," affirmed by the Eleventh Circuit. (App. 18.) The anti-discrimination provisions of Title VII, suggest nothing surrounding circumstances that protected activity should be anything more than exactly the same activity that Petitioner expressed when she complained to the manager by email message titled "harassment," requesting the public safety managers to cease the harassment. (*See,* Randstad Beal's Depo., Vol. III, Doc. 42-4, Ex. 27.) Petitioner further engaged in a meeting with her manager to request the director to cease smearing mud off his shoe onto Petitioner's office chair. (*See,* CSX Elliott Aff. at 5.) Petitioner attempted to schedule a meeting with the senior managers to discuss the degrading harassment, although the meeting was denied. *(See,* Randstad Beal Depo. Vol. II, Doc. 42-3, pgs. 86-87, Ex. 3. & pg. 93, Ex. 5.) Petitioner further notified agency supervisors to advise of her plans to

file racial discrimination and harassment charges. (*See,* Randstad Beal's Depo. Vol. III, Doc. 42-4, pg. 34, interog. 9.) As a last resort, without any remedial measures by Respondents, Petitioner filed U.S. EEOC charges. (Doc. 30, Ex's. B-F. & Ex's. H-O.) There are no magical words that must be used in order for opposition to be protected. "Complaining to anyone about alleged discrimination against oneself or others is an example of covered opposition conduct. An individual's internal complaint of racial discrimination and harassment to a "supervisor" has been held to "surely" constitute protected opposition." *Kotcher v. Rosa & Sullivan Appliance Ctr.,* 957 F.2d 59, 65 (2nd Cir. 1992); see also, *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000) "An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance." *EEOC Enforcement Guidance:* Vicarious Employer Liability for Unlawful Harassment By Supervisors. The Supreme Court held that "When a supervisor engages in harassment which results in an adverse "tangible employment action" against the employee, the employer is automatically held vicariously liable for the harassment." *Ellerth,* 524 U.S. at 763, 118 S.Ct. 2257; *Faragher,* 524 U.S. at 790, 118 S.Ct. 2275.

With respect to the adverse employment action taken by Respondent CSX, unquestionably it was the failure to hire, along with the instruction to Respondent Randstad to terminate, and disqualify Petitioner from all future work assignments at the CSX corporate office site. Despite having spent the bulk of her career (ten years) in corporate administration, Respondents repeatedly argued that Petitioner was not qualified for the entry-level administrative positions for which she had applied,

although she held two of the positions in a temporary capacity, and supported the executive management staff for a three year span. (CSX Callahan Aff. at 5 – 23.); specifically, (*See,* CSX Callahan Aff. at 5 – 6 abolished positions to exclude Petitioner, and 7, 11, & 23 filled by Caucasian candidates.); (*See,* Doc. 51, pgs. 15 - 19., petitioner's qualifications), and (Randstad Beal's Depo., Vol. III, Doc. 42-4, pgs. 16-17. 19 & 40., petitioner's qualifications) Exactly how much qualification does one need to perform the duties of a truckload coordinator, capacity coordinator, or an emerging account specialist, perhaps a high school diploma. The positions were offered to Caucasian candidates, or abolished to exclude Petitioner. Collaboratively, Respondent Randstad proceeded to advise the unemployment office that Petitioner had quit the CSX assignment to block unemployment benefits, and seal Petitioner's disqualification status. (*See,* Randstad Beal's Depo. Vol. III, Doc. 42-4, pgs. 30-32.) Randstad also provided adverse disclosure to Petitioner's subsequent employer, Kelly Services and Johnson & Johnson, which resulted in abrupt termination. Although no direct evidence, the circumstances are overwhelming, particularly, because Petitioner has been denied employment in the city of Jacksonville, Florida for nearly three years after termination from Johnson & Johnson, thus forcing her into exile from her native home of forty-eight years - as a direct result of opposing Respondents' unlawful "referral classification" system, in severe violation of Title VII § 703 (a) (1) (2) (b), and § 704 (a). (*See,* Doc. 65, pgs. 13-17.); (*See,* Randstad Trednick Aff. at 3-6. & Wotanis at 3.) (noting affidavits falsely denying adverse communication) Under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-05 (1973), the race discrimination violation based on the failure to hire claim was established when each Respondent collaborated on the failure to refer for hire, the failure to hire, termination and

disqualification from future work assignments, after complaints of harassment, and the filing of U.S. EEOC charges. Any reasonable fact finder would conclude that these events are undeniably causally related to an unspeakable retaliation by each Respondent. There are no logical defenses nor explanations that would not be considered pretexual by a jury in justifying Respondents retaliatory actions.

There is no language in the statues that would support the contrary conclusions of the courts below. Even if the language or Court precedent could have been construed with such limited and narrow purpose, this Court settled the matter in *Burlington Northern & Santa Fe Rail Co. v. White,* 548 U.S. 53 (2006), when it protected the principle of "unfettered access to statutory remedial mechanisms," an employee need not show that the alleged retaliatory conduct impacted his or her "compensation, terms, conditions, or privileges of employment"; rather, the employee must only show that a "reasonable person" would have been dissuaded from exercising his or her Title VII rights as a result of the employer's actions, even if such actions are unrelated to the workplace. (citation omitted) Without this vital protection private litigants would not risk employer retaliation, as a consequence, effective enforcement of the statutes would become futile. The policy of the federal anti-discrimination laws prohibits any form of retaliation that is reasonably likely to obstruct the exercise of protected rights. In *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), this Court held, "We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to "economic" or "tangible" discrimination,' and that it covers more than '"terms" and "conditions" in the narrow contractual sense.'" (citation omitted)

The Court held in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) that Title VII protects former employees from retaliation. Because an employer no longer has an employment connection with a former employee, it cannot make any employment decisions regarding the former employee. In fact, Robinson's alleged retaliation consisted of a negative employment reference. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996), for example, the Tenth Circuit found illegal retaliation under Title VII when the employer filed false criminal charges against the employee who had filed a discrimination charge. There, the Court observed that "a statute which is remedial in nature should be liberally construed." (citation omitted) The Eleventh Circuit's ruling rejected the Fifth Circuit's interpretation of the anti-retaliation provisions as "inconsistent with the plain language of Title VII" in *Wideman v. Wal-Mart Stores, Inc.*, 141 F. 3d 1453, 1456 (11th Cir. 1998). (citation omitted) Furthermore, the EEOC expressly provides for a comprehensive examination of the statutes clarity in the following publications: Ernest F. Lidge III, "The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate," 47 U. Kan. L. Rev. 333, 382-84 (1999); EEOC Guidance on Investigating, Analyzing Retaliation Claims: 8 Fair Empl. Prac. Man. (BNA) 405:7581, 405:7589 (May 20, 1998), and The EEOC Compliance Manual: Section 8, Retaliation (May 20, 1998).

In light of the established precedent, and the fact that most employees harassed by their managers are usually fearful of the manager's authority to hire or terminate, it should not be surprising that many victims of employer retaliation will have opposed discrimination and racial harassment after termination of the employment contract. The lower courts notion about what constitutes

adverse employment action, and retaliatory conduct is in conflict with this Court, other Circuit precedent, a total departure from Title VII's intended purpose, and not in agreement with the Supreme Court finding reasons to clarify the requirements for discrimination and retaliation claims differently.

III. Importance of the Issue.

In so far as the relevance of these precedents, the national importance of having the Supreme Court decide the questions involved is not only critical to enforcement on those who would seek, in reckless abandonment, a contrary interpretation to unsettle many Court precedents, but also to the many minority contractual or temporary employees who are persistently denied their right to work in an environment free from discrimination, harassment, and retaliation. Every individual deserves an equal chance to secure permanent employment without covert "referral classification" systems, seemingly threatening to replace anti-discrimination policies within the workplace. History has proven as discriminatory employment practices become more refined, subtle comments, and clandestine personnel meetings will have rendered existing anti-discrimination statues practically meaningless, without greater enforcement to effectively protect those individuals adversely affected by discrimination. "We have often recognized the difficulty of proving discrimination by direct evidence." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999) (recognizing that "'smoking gun' evidence is rarely found in today's sophisticated employment world") In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986), the Court noted "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors." (internal

citations omitted) Because a great majority of contractual or temporary employees are predominately African American, it would seem reasonable to suggest that this unlawful "referral classification" trend will continue, if not settled by the Court. Over the past decade, many companies lost their way by failing to enforce the laws of the U.S. Constitution, Bill of Rights, and particularly Civil Rights laws. For this reason, the Courts will inherit a wave of related, unduly burdensome lawsuits. We all have a duty to enforce these precious laws to the fullest extent, as they are critical to the survival of all humanity - our continued existence.

Conclusion

For all of the aforementioned reasons, Petitioner prays that this honorable Court grant certiorari, summarily vacate the order below and remand this case for further proceedings in light of Burlington Northern & Santa Fe Rail Co. v. White, 548 U.S. 53 (2006); Robinson v. Shell Oil Co., 519 U.S. 337 (1997; Vizcaino v. Microsoft Corporation, 97 F.3d 1187 (9th Cir. 1996), Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Respectfully submitted,

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Date: May 15, 2009

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-11487-D

Non-Argument Calendar

D. C. Docket No. 06-01099-CV-J-25-HTS

JANET M. BEAL,

Plaintiff - Appellant,

versus

CSX CORPORATION,

RANDSTAD,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(January 21, 2009)

Before BLACK, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Janet Beal, an African-American female, appeals pro se from the district court's grant of summary judgment in favor of defendants CSX, Corporation ("CSX") and Randstad in her employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, ("Title VII"), 42 U.S.C.§§ 2000e-2(a), 3(a), and the district court's order that she pay costs to the defendants, pursuant to Federal Rule of Civil Procedure 54(d)(1).[1] On appeal, Beal argues that: (1) Randstad engaged in retaliation after she complained of harassment and filed complaints with the Equal Employment Opportunity Commission ("EEOC"); (2) CSX racially and sexually discriminated against her when it failed to hire her; and, (3) the district court abused its discretion by ordering her to pay costs.

I. Retaliation

Beal asserts that she was retaliated against when Randstad: (1) barred her from future work. assignments; (2) impeded her ability to find work in Jacksonville, Florida; (3) interfered with her unemployment benefits; and, (4) aided in her termination from Johnson & Johnson.

Title VII prohibits retaliation in employment and provides that:

It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000E-3(a).

"To establish a prima facie case of retaliation under Title VII, a plaintiff must show that (1) [s]he engaged in a statutorily protected expression; (2) [s]he suffered an adverse employment action; and (3) there is some causal relation between the two events." *Pennington v. City of Huntsville,* 261 F.3d 1262, 1266 (11th Cir. 2001) (internal quotation marks and citation omitted). Regarding the causal link, "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Id.* (internal quotation marks and citation omitted). Once the plaintiff has met her burden of establishing a prima facie case of retaliation, the employer then has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. *Crawford v. Carroll,* 529 F.3d 961, 976 (11th Cir. 2008) (citation omitted).

Here, Beal acknowledged in her deposition that she never reported the harassment that she allegedly experienced at CSX to Randstad. She further testified that she did not complain to CSX, either verbally or in writing, of either sexual or racial harassment until after her assignment there ended. Therefore, Beal's claim that she was retaliated against after complaining about harassment is without merit, given that she has admitted that she never made any such complaints.

Beal failed to establish a *prima facie* case of retaliation because she did not demonstrate that Randstad was aware of her protected activity at the time it allegedly retaliated against her. The district court therefore did not err in granting summary judgment to Randstad as to Beal's retaliation claim.

II. Failure to Hire

Beal contends that she was qualified for at least one of the more than 20 positions for which she applied at CSX. However, she asserts that CSX either abolished the positions for which she was qualified or filled those positions with Caucasian candidates.[2]

Title VII prohibits employment discrimination on the bases of a number of characteristics, including race and gender, 42 U.S.C. § 2000e-2(a)(1). Because Beal is alleging a failure to hire claim, she must show that: (1) she is a member of a protected class; (2) she applied for and was qualified for an available position; (3) she was rejected and, (4) the defendant filled the position with a person outside of her protected class. *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1274-75 (11th Cir. 2002) (citation omitted). Once a plaintiff establishes a prima facie case, "the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for his adverse action." *Id.* at 1274. When the defendant articulates such a reason, "the presumption of discrimination is eliminated, and the plaintiff must submit evidence showing that the articulated reason is pretexual." *Id.*

Although Beal satisfies the first prong of the test, as she is a nember of a protected class, she has not presented evidence demonstrating that she was qualified for the positions for which she applied. Additionally, Beal has demonstrated that CSX filled the positions for which she applied with individuals outside of her protected class. In fact, she acknowledged that she knew nothing about how, why, or by whom the positions were filled. Furthermore, CSX provided a non-discriminatory reason why each other candidate was selected. Thus, Beal failed to establish a

prima facie case of sex or race discrimination based on failure to hire.

III. Order to Pay Costs

Finally, Beal argues that the district court erred by not granting her relief from court costs. She alleges that she is being punished for exercising her constitutional rights.

"This court will not disturb an award of costs unless a clear abuse of discretion is demonstrated." Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991) (citation omitted). "[T}he proper inquire is not how the reviewing court would have ruled if it had been considering the case in the first place, but whether the premise upon which the district court exercised its discretion was correct." *Id.* Federal Rule of Civil Procedure 54(d)(1) provides that, "'[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." FED.R.CIV.P. 54(d)(1).

Here, Beal has neither alleged nor demonstrated how the district court abused its discretion in ordering that she be taxed costs. The district court properly awarded costs to the prevailing party and taxed Beal only the court costs, not including attorney's fees. Thus, the district court has not abused its discretion.

CONCLUSION

Upon review of the record and the parties' briefs, we discern no reversible error. Accordingly, we affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 08-11487-D

District Court Docket No.
06-01099-CV-J-25-HTS

JANET M. BEAL,

Plaintiff - Appellant,

versus

CSX CORPORATION,
RANDSTAD

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Florida

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 21, 2009
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JANET M. BEAL

Plaintiff,

v. CASE NO. 3:06-cv-1099-J-25HTS

CSX CORPORATION and
RANDSTAD

Respondents.

ORDER

THIS CAUSE is before the Court on Defendant Randstad's Motion for Summary Judgment (Dkt. 45) and Request for Oral Argument (Dkt. 46), Defendant CSX Corporation's Motion for Summary Judgment (Dkt. 47), and Plaintiff Beal's consolidated response thereto (Dkt. 51). Upon due consideration, the Court finds that it may properly rule on the motions without oral arguments. *See* Local Rule 3.01(j.) Defendant Randstad's request for oral argument is therefore denied. The Court finds as follows:

I. INTRODUCTION

The Court begins this introduction with a quote from Plaintiff's response to the Defendants' motions for summary judgment: "Counsels' Motion for Summary Judgment elaborates on how outrageous Plaintiff's claims are." (Pl.'s Resp. at 10.) Plaintiff continues by stating that

her claims are "only as bizarre as the Defendants' ruthless employees[' actions] were." *(Id.)* A plain reading of Plaintiff's statements may lead one to reasonably conclude that Plaintiff concedes that her claims are "outrageous" and "bizarre." However, in light of the time both parties have expended on this case and the fact that Plaintiff is proceeding pro se, the Court will not impose such a stringent interpretation of Plaintiffs statements. The statements may have been made in jest, though improvidently so.

While the Court is not insensitive to Plaintiff's efforts to vindicate her claims, this Court is nonetheless compelled to apply the Rules of this Court, including the Federal Rules of Civil Procedure. The Court has denied Plaintiffs previous requests for miscellaneous relief for failure to comply with the Rules of the Court. *See* Orders (Dkts. 15 & 34 (denying motion for interim earnings relief and denying motion for temporary emergency relief, respectively). Plaintiff has had ample time to familiarize herself with the Rules of the Court, and Defendants should not be unduly prohibited from utilizing available procedural vehicles to seek a summary judgment ruling in their favor. Therefore, the Court will consider Defendants' motions under the appropriate legal standard.

Plaintiff makes numerous factual allegations in her response to the Defendants' motions for summary judgment. However, Plaintiff fails to reference the evidence supporting those allegations. *See Atlanta Gas Light Co. v. UGI Utils., Inc.*, 463 F.3d 1201, 1209 n. 11 (11 th Cir. 2006) ("Neither the district court nor this court has an obligation to parse a summary judgment record to search out facts or evidence not brought to the court's attention."). For example, on pages 4 and 5 of the response. Plaintiff

provides a litany of factual allegations without any evidentiary support.

At the summary judgment stage, Plaintiff's bare allegations are insufficient to withstand a summary judgment ruling in Defendants' favor. *Gordon v. Watson,* 622. F.2d 120. 123 (5th Cir. 1980)' ("[W]e note that [Plaintiff's] 'Answer to defendants Motion for Summary Judgment' also fails to comply with Rule 56. It is an unsworn statement, which the court may not consider in determining the propriety of 'summary judgment.") (citations omitted); *Carmack v. Gibson.* 363 F.2d 862. 864 (5th Cir. 1966) ("[Oln motion for Summary Judgment, the Court with the evidential facts, not the bare allegations, can determine in advance of trial whether there is a genuine issue for ultimate decision of judge or jury.") (citations omitted).

Notably, Plaintiff did file affidavits to support her response to Defendants' motions, but the affidavits do not provide most of the factual allegations which are asserted in Plaintiffs response. Notwithstanding Plaintiffs failure to reference evidence in the record, the Court has carefully reviewed the material submitted by both parties, and the Court finds no evidence to support many of the factual allegations Plaintiff makes in her response. The Court now turns to the merits of this case.

II. BACKGROUND

Plaintiff Janet Beal was an employee of Defendant Randstad; she was not an employee of CSX.[2] (CSX's[3] Beal Dep. 102:20 - 103: 1, Aug. 27, 2007.) Randstad is a staffing service that supplies temporary employers to its various clients, including Defendant CSX Corporation ("CSX"). (Randstad's Mot. for Summ. Judg. (Dkt. 45) at 3.) Defendant CSX is the parent company of a number of

subsidiaries that provide freight transportation services. (Randstad's Beal Dep. (Dkt. 42): Ex. 24 at 5.)

On August 29, 2005, Plaintiff began a temporary assignment performing administrative duties in CSX's Public Safety & Environment Department ("Public Safety"). (CSX's Beal Dep.192-93.) At the time of Plaintiff's first assignment to CSX, Randstad issued Beal a copy of the Employee Handbook that it provides to all of the associates assigned to work at CSX, entitled "CSX: Your Guide to a Successful Assignment." (Randstad's Beal Dep. 240. Sept. 25, 2007.) The handbook provides that Beal was to bring any complaints about discrimination or harassment to the attention of an on-site Randstad agent or Randstad's human resource's department. *(Id.,* Ex. 24 at 12, 24.)

On or about July 12, 2006. Plaintiff complained to Robert Reed and Amber Clark. Randstad agents, that she was having problems with hostility from CSX employees and that rumors were circulating throughout the company. (Beal's Resp. at 4; Randstad's Beal Dep. 75-76, 201.) At this time, Plaintiff did not consider the hostility and harassment to be either of a racial or sexual nature. (Randstad's Beal Dep. 75-76. 205.) At some time during her assignment at CSX, Plaintiff told Shannon Goss, Administrative Assistant at CSX. that several employees at CSX were racists. (CSX's Beal Dep. 439-40.) Plaintiff also complained to Howard Elliot, Vice President of Public Safety at CSX, that a CSX employee, Michael Lunsford, put his foot in Plaintiff's chair. (Elliot Aff. ¶¶ 3 & 5.) While Plaintiff was working at CSX, several persons would throw money near Plaintiff; however, Plaintiff concedes that she cannot identify any of the individuals. (Pl.'s Resp. at 5.)

In June of 2006, the Public Safety department no longer needed Plaintiff's services. (Elliot Aff. (Dkt. 47-3) ¶ 6.) Plaintiff subsequently was assigned to two other departments at CSX--Corporate Communications, which assignment lasted a little more than a year; and the Benefits Department, which assignment lasted only a few days. (CSX's Beal Dep. 193-95.) Plaintiff's assignments with CSX ended on August 9, 2006. (Beal **Aff.** ¶ 4.)

Plaintiff also makes allegations regarding Defendant CSX's failure to hire her for several positions. (Amend. Compl. ¶ 5.) While Plaintiff was providing temporary services for CSX, she applied on-line for twenty (20) positions as an external candidate. (Callahan' Aff. ¶ 4.) Plaintiff stated on her Charges of Discrimination against Defendants CSX and Randstad that "although I had worked at the CSX locution for almost a year, I was not hired by CSX." (CSX's Beal Dep., Exs. 11 & 12.) On those charges, Plaintiff marked "race" and "sex" as the bases of discrimination. (See id.)

In February of 2007, Plaintiff filed new charges for retaliation against Defendants. (See id., Exs. 79 & 80.) Plaintiff states in the particulars that she did not use either Defendant as a reference in seeking further employment. (Id.) However, Plaintiff states that Defendants communicated with other employees at companies where Plaintiff was employed or seeking employment. (CSX's Mot., Exs. 79 & 8O.) Those companies deny that Randstad ever communicated with them regarding an employment reference for Plaintiff. (See ; *accord* Wotanis' Aff. (Dkt. 44-2) ¶ 3 (stating that she never contacted Randstad for an employment reference and that no one from Randstatl ever contacted her to offer an employment reference); Trednick[6] Aff. (Dkt. 43-2) ¶¶ 2-3 (stating that Plaintiff did not list Randstad as an

employment reference and she never contacted Randstad for an employment reference).)

Plaintiff also alleges that she and her son were subjected to harassment while conducting daily activities. However, Plaintiff never identifies the persons who were allegedly harassing them. (See Amend. Compl. at 3 (referring to the individuals as "Defendants' subordinate harassers"): Pl.'s Resp. at 9 (referring to them as "nameless CSX employees").)

Plaintiff's Amended Complaint alleges claims of race discrimination, sex discrimination, retaliation, and slander. Both Defendants filed motions for summary judgment as to each claim except slander, and Plaintiff filed a response.

III. STANDARD OF REVIEW

Summary judgment will be granted when "the pleadings, depositions, answers to interrogatories. and admissions on file, together with the affidavits, if any. show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." *Celotex Corp. v. Catrett.* 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). Rule 56 "mandates the entry of summary judgment. . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515, 15 18 (11th Cir. 1988) (omission in original) (citations omitted). The Court may grant summary judgment when the evidence favoring the nonmoving party is merely

colorable or is not significantly probative. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

The movant bears the exacting burden of demonstrating that there is no dispute as to any material fact in the case. *Celotex Corp.*, 477 *U.S.* at 323: *Hairston v. Gainesville Sun Publ' g Co.*, 9 F.3d 913, 918 (11th Cir. 1993): *Warrior Tomigbee Trump. Co.* v. *M/V Nan Fung.* 695 F.2d 1294. 1296 (11th Cir. 1983). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *Celotex,* 477 U.S. at 324; *Howard v.* BP *Oil Co.. Inc.*, 32 F.3d 520. 524 (11th Cir. 1994).

When deciding a motion for summary judgment, "[i]t is not part of the court's function . . . to decide issues of material fact, but rather [it is to] determine whether such issues exist to be tried. . . " and "[t]he court must avoid weighing conflicting evidence or making credibility determinations." *Hairston,* 9 F.3d *at* 919 (citing *Anderson,* 477 U.S. at 252). The only determination for the court in a summary judgment proceeding is whether there exists genuine and material issues of fact to be tried. *Id.* at 921: *Dominick v. Dixie Nat'l Life Ins. Co.*, 809 F.2d 1559 (11th Cir. 1987). All the evidence and the inferences from the underlying facts must be viewed in the light most favorable to the nonmovant. Earley v *Champion Int'l Corp.* 907 F.2d 1077, 1080 (11th Cir. 1990).

IV. DISCUSSION

A. Slander

Defendants do not address a claim for slander in their motions for summary judgment. However, in

Plaintiff's response, she indicates that the Amended Complaint also contained a claim for slander. (See Pl.'s

Resp. at 3 & 10.) Plaintiff does not invoke the Court's supplemental jurisdiction to consider this state law claim, and therefore, Court is not required to consider it. *Accord United States ex rel. Rumseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523 (1 0th Cir. 1996) (declining to consider state law claim because "plaintiffs complaint failed to invoke the court's supplemental jurisdiction under 28 U.S.C. § 1367"); *Pinkley, Inc. v. City of Frederick, Md.*.19 1 F.3d 394,400 (4th Cir. 1999) ("Here, where the plaintiff failed to plead a conversion theory, and where the surprise ruling patently prejudiced the defendants, as we set forth below, Rule 54 (c)[7] does not support the district court's decision to invoke supplemental jurisdiction on its own initiative."). Because Plaintiff is proceeding *pro se* and Defendants are not prejudiced by the Court's ruling on the claim, the Court will address the state law claim.

Plaintiff does not allege in the Complaint what false statement is attributed to Defendants. *See Rubin v. U.S. News & World Report, Inc.*, 27 1 F.3d 1305, 1306 (11th Cir. 2001). In her response to the Defendant's motions for summary judgment, Plaintiff argues that she heard Frank Sanders, CSX Chief of Police, tell others that Plaintiff was a criminal. (Pl.'s Resp. at 4.)

Under Florida law, one of the essential elements to prove a claim for slander is publication of a false statement. *See* Ivey v. Paulson. No. 6:07-CV-478-OR122DAB, 2007 WL 1129001, at *2 (M.D. Fla. Apr. 16, 2007) ("To recover for libel or slander under Florida law, a plaintiff must demonstrate that: 1) the defendant published a false statement: 2) about the plaintiff, 3) to a third party; and 4) the plaintiff suffered damages as a

result of the publication.") (quoting *Thompson v. Orange Lake Country Club, Inc.*, 224 F. Supp. 2d 1368, 1376 (M.D. Fla. 2002)).

The only evidence Plaintiff presents regarding the first element is a criminal history background check document from the Office of the Sheriff of Jacksonville, Florida. However, the document states, "[s]ince neither fingerprints nor an identifying number accompanied your request, we cannot guarantee this information concerns the named individual." (Pl.'s Resp., Ex. X.) The document further provides that it relates only to "local arrest information." *(Id.)* That evidence is insignificantly probative of the first essential element of the cause of action. The Court has liberally construed Plaintiff's Amended Complaint as asserting a state law claim for slander. However, summary judgment is due to be granted in Defendants' favor as to that claim.

B. Defendant CSX's Motion for Summary Judgment

i. Harassment and Retaliation

Title VII provides in part that it "shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions. or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(l). Plaintiff concedes that she was an employee of Randstad. not CSX, during the times of her appointments with CSX. Also, Plaintiff applied for several positions at CSX as an external candidate during her assignment. *Accord Hackett v. United Parcel Service, Inc.*, No. 98-J-0030-S. 1999 WL 33 134347, at *3 (N.D. Ala. Apr. 23, 1999) (stating that "[t]he

most telling fact regarding Plaintiff's relationship to [Defendant] UPS is her own testimony that she spoke to co-workers about seeking employment with UPS during her temporary assignment there. Her actions are inconsistent with her allegation that she was an employee of UPS.") (citation omitted).

Further, the CSX handbook provides that Beal was to bring any complaints about discrimination or harassment to the attention of an on-site Randstad agent or Randstad's human resources department. See *Lopez v. Johnson*, 333 F.3d 959,963 (9th Cir. 2003) (finding no joint employment where the contractor providing temporary employees maintained its own on-site supervisors). Randstad was also responsible for paying Plaintiff's wages. The facts of the record clearly establish that Randstad-not CSX-was Plaintiff's employer. Therefore, the failure to hire claim is the only claim alleged under Title VII by which Plaintiff may seek to impose liability on Defendant CSX. The Court will now turn to that claim.

ii. Failure to Hire Claim

To establish a prima facie case of discrimination regarding a failure to hire claim, Plaintiff must prove that (1) she is a member of a protected class, (2) she was qualified for a position and applied for it. (3) she was not considered for the position despite her qualifications, and (4) equally or less qualified individuals outside of her protected class were considered or hired for the position. *See Underwood v. Perry County Comm'n, 431 F. 3d* 788. 794 (11th Cir. 2005). As discussed herein, Plaintiff fails to establish a *prima facie* case on this claim.

Plaintiff's failure to hire claims arise from her allegations that she applied for twenty positions at CSX

and was not hired for any of those positions. In the Complaint, Plaintiff alleged that she was more qualified for the positions than the persons who were hired for them.

First, Defendant CSX argues that Plaintiff failed to satisfy the jurisdictional prerequisites to pursue a failure to hire claim because she did not complain about the positions in her charge of discrimination. The Court disagrees. Plaintiff stated on her Charges of Discrimination against Defendants CSX and Randstad that "although I had worked at the CSX location for almost a year, I was not hired by CSX." (CSX's Beal Dep., Exs. 11 & 12.) Therefore, Plaintiff did complain about CSX's failure to hire her, and the Court will consider that claim as properly within the Court's jurisdiction.

However, Plaintiff fails to specify the positions upon which her failure to hire claim is based. *See Underwood*, 431 F.3d at 795 ("When [plaintiff] failed to identify a position for which she applied and the gender of the person who filled that position, she failed to carry her burden to avail herself of the McDonnell Douglas presumption. That failure is fatal to her complaint of discrimination."). Notably, Plaintiff's response memorandum provides the name, race, and gender of four individuals who were hired for positions in CSX's public safety department. *(See* Pl.'s Resp. at 3.) However, Plaintiff only argues that she applied for one of those positions. namely the position for which Jennifer Richardson was hired. (Id.) Further, Plaintiff presents no evidence that she was qualified for those positions. It is not incumbent upon the Court to decipher every possible avenue of relief: Plaintiff has the burden to establish *prima facie* case.

To the contrary, Defendants presented evidence that Plaintiff applied for twenty positions with CSX. Defendants

also presented evidence establishing that, with regard to each of the twenty positions. 1) some were never filled, 2) some were filled by persons in Plaintiff's protected class, 3) some were filled by internal candidates, 4) Plaintiff did not have the requisite qualifications for the positions. And/or 5) Plaintiff was not the most qualified candidate. *(See* Callahan Aff. ¶¶ 4-23.) Plaintiff fails to establish a *prima facie* case of discrimination based on a failure to hire, and therefore, Defendant CSX's motion for summary judgment is also due to be granted as to Plaintiff's failure to hire claim.

C. *Defendant Randstad's Motion for Summary Judgment*

Plaintiff can prove her Title V11 claims with direct or circumstantial evidence. *Burke-Fowler* v. *Orange County, Fla.,* 447 F.3d 1319, 1322-23 (11th Cir. 2006); *see Mize* v. *Jefferson City Bd. Of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996) ("Where the non-movant presents direct evidence that, if believed by the jury, would be sufficient to win at trial, summary judgment is not appropriate even where the movant presents conflicting evidence."). Direct evidence has been defined as "evidence which if believed. proves existence of fact in issue without inference or presumption." *Merritt* v. *Dillard Paper Co.*. 120 F.3d 1181. 1189 (11th Cir. 1997) (quoting *Rollins* v. *TechSouth Inc.*, 833 F.2d 1525. 1528 n.6 (11th Cir. 1987)).

In this case, Plaintiff has no direct evidence of discrimination by Defendants. Therefore, the Court will use the framework in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), to evaluate Plaintiff's claims. Under this framework, the plaintiff first must establish *a prima facie* case of discrimination. *See Combs v. Plantation Patterns,* 106 F.3d 1519, 1527-28 (11th Cir. 1997).

i. Race and Sex Discrimination

An employee can establish a violation against an employer in either of two ways: 1) through tangible employment action - i..e., discharge, demotion, pay decrease, etc., which are referred to as *quid pro quo* claims: or 2) through creation of a hostile work environment caused by racial or sexual harassment that is sufficiently severe or pervasive to alter the terms and conditions of the work. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1300 (11th Cir. 2007) (citing *Hulsey v. Pride Rests., LLC,* 367 F.3d 1238. 1245 (11th Cir. 2004)); *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197. 1200 (11th Cir. 2001) (citing *Burlington Indus., Inc. v. Ellerth,* 524 *U. S* .742. 760-63 (1998)). The latter scenario is at issue here.

> A hostile work environment claim under Title VII is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult. that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment claim show: (1) that he belongs to a protected group: (2) that he has been subject to unwelcome harassment: (3) that the harassment must have been based on a protected characteristic of the employee. such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment: and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th

> Cir. 2002) (internal citations omitted). "Title VII does not prohibit all verbal or physical harassment in the workplace,' and 'does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite *sex."'Johnson* v. *Booker T. Washington Broad. Serv., Inc.,* 234 F.3d 501, 509 (l 1 th Cir. 2000) (quoting *Oncale v. Sundower Offshore Servs., Inc.,* 523 U.S. 75, 50-81 (1998)).

The requirement that the harassment be "sufficiently severe or pervasive" contains both an objective and a subjective component. *Miller* v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002) (citing *Harris v. Forklift Sys.,* 510 *U.S.* 17, 21-22 (1993)). Thus, the "behavior must result in both an environment 'that a reasonable person would find hostile or abusive' and an environment that the victim 'subjectively perceives to be abusive.'" ***Id.*** (citing same). "All of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment." *Gupta* v. *Florida Bd. qf Regents,* 212 F.3d 571 (11th Cir. 2000) (quoting *Indest v. Freeman Decorating, Inc.,* 164 F.3d 258, 264 (5th Cir. 1999)).

As to the subjective component, Plaintiff testified in her deposition that. while on assignment at CSX. she did not consider the alleged harassment to be of a racial or sexual nature. Therefore, it is questionable whether Plaintiff even satisfies the subjective component of the analysis. However, there is ample evidence to raise a genuine issue of fact as to the subjective component, and the Court need not make a finding as to this element on summary judgment.

In evaluating the objective component, the court considers: "(1) the frequency of the conduct: (2) the severity of the conduct; *(3)* whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Miller.*, 277 F.3d at *1276* (citing *Allen v. Tyson Foods,* 121 F.3d 642. 647 (11th Cir. 1997)). The allegations and evidence provide sporadic examples of harassing conduct. Further, Plaintiff does not discuss how the conduct interfered with her job performance while she was employed; instead, Plaintiff contends that the Defendants' acts affected her ability to obtain a permanent position with CSX. *(See* Pl.'s Resp. at 5.) The only work-related incident where the conduct may even remotely be considered physically threatening was the firm handshake during an interview. *(See* Pl.'s Resp. at *4.)* Plaintiff describes other instances of conduct by "Defendants' subordinate harassers," but there is no evidence of the identity of these individuals or their relationship to Defendants.

The Court has considered all of the behavior and conduct collectively. Under the objective analysis, the Court finds that the conduct in question was not sufficiently severe or pervasive. As stated in *Gupta,* "[tlhe alleged harassment in this case exemplifies 'the ordinary tribulations of the workplace.'" Gupta, 212 F.3d at 586 (citing *Faraghcr v. City of* Boca Raton, 524 U.S. 775. 788 (1998)).

ii. Retaliation

To establish a prima facie case of retaliation under Title VII, Plaintiff must show "(1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some

causal relation between the two events." *Thomas v. Cooper-Lighting, Inc.*, 506 F.3d 1361,1363 (11th Cir. 2007) (quoting Meelcs *v.* Computer Assocs. Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994)). Plaintiff claims that the acts of retaliation were the result of Plaintiff pursuing race discrimination and sexual harassment claims against the Defendants. (Pl.'s Resp. at 7.) The parties do not dispute that tiling charges of discrimination is protected activity, so the Court will only consider whether the other elements have been satisfied.

In the Complaint, Plaintiff does not specifically allege what adverse employment action she suft'ered; instead, she provides a litany of events that have occurred since her assignment with CSX ended. (Amend. Compl. at 3-4.) In many instances, Plaintiff concedes that she cannot identify the persons responsible for some acts. Hence, it is impossible to establish a link between such individuals and Defendants.

In her response to the motions for summary judgment, however, Plaintiff argues that the adverse employment action was being barred from working for Randstad. (Pl.'s Resp. at 7.) Plaintiff testified in her deposition that she sought employment with Kelly Services, another temporary staffing agency, on August 19, 2006, which was approximately ten (1 0) days after her assignment with CSX ended. (Randstad's Beal Dep. 158-59.) Plaintiff does not allege that she sought another assignment with Defendant Randstad after her assignment with CSX ended. Interestingly enough, Plaintiff filed a claim for unemployment benefits from Randstad 011 August 6, 2006, see Pl.'s Rcsp., Ex. V ("CLAIM FILED EFFECTIVE: 08/06/06"), although Plaintiffs last assignment with CSX through Randstad did not end until

August 9.2006. Therefore, her argument that she was barred from working for Randstad is merely colorable.

The Court will also consider the other alleged acts that occurred after Plaintiffs assignment ended with CSX. Without evidence establishing persons' identities or relation to the Defendants, the Court finds that Plaintiffs relies on speculation and conjecture in concluding that Defendants' employees were "monitor[ing]" her whereabouts and engaging in "tortuous activity." *(See* Pl.'s Rcsp. at 8-9.)

Also, Plaintiff contends that Defendants communicated with other employees at companies where Plaintiff was employed or seeking employment, but those companies deny that they ever communicated with Randstad regarding an employment reference for Plaintiff. *(See* Wotanis Aff. ¶ 3: Trednick Aff. ¶¶ 2-3.) Notably, Plaintiff states that she did not even list Defendants as references on her employment application materials. Even assuming *arguendo* that Defendants did communicate with Plaintiffs other employers or prospective employers, Plaintiff provides no evidence regarding what information was communicated. Plaintiff's allegations are unsubstantiated by the evidence. The Court finds that Plaintiff has failed to establish a causal link between any protected activity and an adverse employment decision, and Defendant Randstad's motion for summary judgment is due to be granted.

V. CONCLUSION

Plaintiff Beal, who is proceeding ***pro*** se, brought claims for slander, racial discrimination, sexual discrimination, and retaliation. The Amended Complaint does not clearly set forth the slander claim. and Plaintiff

did not invoke the Court's supplemental jurisdiction over that state law claim. Defendants filed motions for summary judgment as to each claim except slander. Nonetheless, the Court has construed the Amended Complaint as also containing a claim for slander. Despite Plaintiffs failure to invoke the Court's supplemental jurisdiction over the state law claim. the Court has considered it in ruling on the motions for summary judgment. For the reasons discussed herein, the Court finds that summary judgment should be granted in favor of both Defendants as to each claim in the Amended Complaint. Accordingly, it is

ORDERED:

1. Defendant Randstad's Request for Oral Argument (Dkt. 46) is **DENIED.**

2. Defendant Randstad's Motion for Summary Judgment (Dkt. 45) and Defendant CSX Corporation's Motion for Summary Judgment (Dkt. 47) are **GRANTED.**

3. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff and to close this case.

DONE AND ORDERED in Chambers this 27th **day** of March, 2008.

/s/ Henry Lee, Adams, Jr.
HENRY LEE ADAMS, JR.
DISTRICT JUDGE

Copies to: *pro se* Plaintiff
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JANET M. BEAL

Plaintiff,

-vs- CASE NO. 3:06-cv-1099-J-25HTS

CSX CORPORATION and
RANDSTAD

Respondents.

_____/

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

the pursuant to this Court's Order, entered on March 27, 2008, judgment is hereby entered in favor of Defendants CSX Corporation and Randstad, and against the Plaintiff, Janet Beal. The Plaintiff, Janet Beal shall take nothing and the Defendants, CSX Corporation and Randstad, shall recover of the Plaintiff, Janet Beal, their costs of action.

Date: March 28, 2008

SHERYL L. LOESCH, CLERK

/s/ Patrick DiVita
By: DEPUTY CLERK

Copy to:

Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JANET M. BEAL

Plaintiff,

v. CASE NO. 3:06-cv-1099-J-25HTS

CSX CORPORATION and
RANDSTAD

Respondents.

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion to Alter or Amend Order and Judgment (Dkt. 59). Plaintiff's supporting memorandum (Dkt. 65), and Defendant Randstad's response thereto (Dkt. 72). Defendant CSX has not responded to Plaintiff's motion, and the time to file a response has passed. Upon due consideration, the Court finds as follows:

I. BACKGROUND

Plaintiff brought this action against Defendants CSX Corporation and Randstad alleging claims of race discrimination, sex discrimination, retaliation, and slander. Both Defendants filed motions for summary judgment, which the Court granted in its Order dated March 27, 2008. On March 31, 2008, Plaintiff filed a motion to alter

or amend order and judgment (Dkt. 59), and she filed a supporting memorandum on April 9, 2008 (Dkt. 65). Plaintiff filed her motion pursuant to Federal Rule of Civil Procedure 59, but Defendant Randstad contends that the motion is more appropriately construed as a motion for reconsideration pursuant to Rule 60.

II. STANDARD OF REVIEW

"A litigant may move the court to reconsider a grant of summary judgment pursuant to Rule 59(e) or Rule 60(b)." *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 294-95 (M.D. Fla. 1993). Whereas Plaintiff timely filed her Rule 59 motion, the Court finds no reason to consider the motion under Rule 60 as Defendant suggests. Both Rules 59 and 60 provide for relief from a final judgment, though Rule 60 provides a more liberal time period to file a motion for such relief. Also., a "significantly higher standard" applies under Rule 60 than Rule 59. *See Vanderberg v. Donaldson,* 259 F.3d 1321, 1326 (11th Cir. 2001); cf. Mahone v. Ray, 326 F.3d 1176, 1178 (11th Cir. 2003) ("Although Mahone did not specify whether his motion for reconsideration was filed pursuant to Fed. R. Civ. P. 59(e) or 60(b), we designate it as the latter because it was not filed within 10 days of the judgment that it seeks to reopen.") The Court will consider Plaintiff's motion under Rule 59.

"The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). Reconsideration of a prior order is an extraordinary remedy, and limited judicial resources necessitate a strong basis for a court to duplicate its work. A motion seeking reconsideration must (1) "demonstrate some reason why

the court should reconsider its prior decision." and (2) "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Cover, 148 F.R.D. at 295.

III. DISCUSSION

The gist of Plaintiff's motion to alter or amend order seeks reconsideration of issues that were presented in Plaintiff's opposition to Defendants' motions for summary judgment and considered by the Court in its ruling. The Court will address Plaintiff's three stated reasons in turn.

A. Evidence That Should Have Been Noted in Prior Order

Plaintiff argues that the Court "did not consider the unyielding circumstantial, nor direct evidence confirming that the Defendants not only tolerated, but encouraged unlawful, and intentional racial discrimination, harassment, slander, and retaliation against Plaintiff ..." (PL's Mot. At 2.) Plaintiff continues by stating that the "fact that CSX public safety employees felt very comfortable taking possession of Plaintiff's proprietary program, Journey Track, and then discriminating and harassing Plaintiff into a crippling state of duress, validates the bold mindset of the employees were such that they were very confident that there would be no consequence for their actions." (Id.)

Plaintiff is merely rehashing arguments presented in her response to the Defendants' motions for summary judgment. As to this argument, the Court finds no ground to alter or amend its prior Order or the Judgment entered in this case.

B. Contrary and Erroneous Finding

First, Plaintiff points to language in the Order that "[i)n many instances, Plaintiff concedes that she cannot identify the persons responsible for some acts." (*Id.* at 3.) Plaintiff responds to the court's statement by stating that "[a]ll documents in the record refer[] to the retaliation harassers as being known, unknown, nameless, subordinates, or citizen harassers, with all faces identified by Plaintiff as employees who worked for either CSX, Randstad, Johnson & Johnson, or Kelly Services." (*id.*) Identifying persons as "know, unknown, nameless, subordinates, or citizen harassers" who worked for either one of the Defendants or a non-party to this suit is not significantly probative of any person's identity for purposes of summary judgment. Therefore, this argument also fails.

Next, Plaintiff seeks to apprise the Court of customs for the unemployment office, specifically that the unemployment office customarily documents a claim at the beginning of the week in which it is filed. (*id.*) Even assuming *arguendo* that Plaintiff's statement is correct, it has no bearing on the Court's Order or the Judgment because the Court found that with respect to the retaliation claim, "Plaintiff [] failed to establish a causal link between any protected activity and an adverse employment decision." (See Order (Dkt. 57) at 16.)

Regarding Plaintiff's arguments as to complaints, failure to hire, and hostile environment, Plaintiff simply summarizes the arguments presented in her response to Defendants' motions. The Court has considered the evidence and Plaintiff's arguments on these issues. The Court finds no ground to reconsider its prior Order or the Judgment based on these arguments.

C. Retaliation Mistakes

Again, Plaintiff rehashes arguments previously considered by the Court in ruling on the Defendants' motions for summary judgment. Plaintiff has not set forth any "newly-discovered evidence or manifest errors of law or fact." Therefore, Plaintiff's arguments regarding retaliation mistakes also fails.

IV. CONCLUSION

Plaintiff has failed to demonstrate any reason why the Court should reconsider its Order dated March 27, 2008 or amend the Judgment entered on March 28, 2008. Plaintiff's motion to alter or amend the Court's Order on the summary judgment motions and the Judgment is due to be denied.

Accordingly, it is

ORDERED:

Plaintiff's Motion to Alter or Amend Order and Judgment (Dkt.59) is **DENIED**. The Clerk shall terminate the motion at Docket 65, as it is the memorandum in support o Plaintiff's motion at Docket 59.

DONE AND ORDERED in Chambers this 7th day of May, 2008.

/s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-11487-D

JANET M. BEAL,

Plaintiff - Appellant,

versus

CSX CORPORATION,
RANDSTAD,

Defendants - Appellees.

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On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING ENBANC

Before: BLACK, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE